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JAMES R BROWNING

No. 508

In the Supreme Court of the United States

OCTOBER TERM, 1960

GEORGE K. HELBNER, JR., AND RUTH S. HELBNER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Tax Court is reported at 32 T.C. 1162. The opinion of the court of appeals is reported at 280 F. 228.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1960 (Pet. 13a), and the petition for rehearing was denied on July 29, 1960. (Pet. 12a). The petition for a writ of certiorari was filed on October 26, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence supports the determination of both courts below that profit realized by the taxpayer from the sale of a "package" building project was derived from property held by him primarily for sale to customers in the ordinary course of his business, and that consequently the profit was taxable as ordinary income rather than as capital gain.

STATUTE INVOLVED

SEC. 117 [as amended by Sec. 210(a), Revenue Act of 1950, c. 994, 64 Stat. 906]. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

* * * * *

(26 U.S.C. (1952 ed.) 117)

STATEMENT

The taxpayer[1] has been in the construction business in and around Philadelphia since 1930, engaging in the design and erection of industrial and com-

[1] The taxpayer's wife, Ruth S. Heebner, is a party only by virtue of having filed a joint return with him.

mercial buildings (R. 130a). He operated both individually and, after 1934, as the dominant figure in George K. Heebner, Inc. (R. 130a). The taxpayer was president of the corporation and held 89.54% of its stock, the balance being owned in equal parts by his two brothers. As part of his construction business, the taxpayer offered "package" building services to the public, which involved procuring a suitable site for a proposed building, designing and constructing the building, arranging financing and related services, and finally delivering the completed project to the prospective purchaser (R. 130a).

Early in 1951, the taxpayer learned that Nash-Kelvinator Sales Corporation desired to rent an office and warehouse building in the Philadelphia area. He located a suitable site for such a building in Sharon Hill, Pennsylvania, adjacent to the Baltimore and Ohio right of way, which the railroad was willing to sell. He then negotiated a series of interdependent agreements by which (1) Nash-Kelvinator bound itself to lease the land and building when completed (according to specifications) for a twenty-five-year period at a total rental of $1,043,250 (R. 42a); (2) Prudential Insurance Company agreed to purchase the building when completed for the sum of $650,000, upon condition that a lease with Nash-Kelvinator had been executed on terms satisfactory to it; (3) George K. Heebner, Inc., agreed with the taxpayer, as an individual, to construct the building at a maximum cost of $550,000; (4) Frankford Trust Company agreed to make a construction loan of $600,000 to George K. Heebner, Inc., repayable in twenty-four months, upon

the condition that Prudential committed itself to purchase and Nash-Kelvinator to lease the building upon completion; and (5) the railroad agreed to sell the land at the price of $45,000, reserving the right to repurchase at that price if the building were not completed and leased to Nash-Kelvinator within two years. The taxpayer then took conveyance of the land from the railroad, the building was constructed between September 1951 and August 1952, at which time Nash-Kelvinator took possession as lessee, and the property was conveyed to Prudential in February 1953 at the agreed price of $650,000 (R. 134a–140a). In each significant detail of the construction of the project, from its inception in 1951 until the final transfer in 1953, the taxpayer reported to and obtained the approval of Prudential as the ultimate purchaser for whom the project was being constructed (R. 137a).

On his 1953 income tax return, taxpayer reported his profit from the sale of the project as a long-term capital gain. The Tax Court sustained the Commissioner's determination that the profit was taxable as ordinary income (R. 141a–144a). The court of appeals affirmed (Pet. 1a–12a).

ARGUMENT

The question presented is one of fact, the evidence supports the determination of both courts below, and there is no conflict or other reason for further review.

1. This case presents the oft-litigated issue of whether sales profits are taxable as ordinary income or as capital gain. Section 117(a) of the Revenue

Code of 1939, *supra*, p. 2, excludes from the definition of capital assets "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." In the absence of any showing that improper legal criteria have been applied, the question whether property falls within the excepted category must be resolved in the light of the particular facts, and this Court has consistently refused to review cases presenting this factual issue.[2]

2. The record fully supports the conclusion of both courts below that the property involved here was held primarily for sale in the ordinary course of the taxpayer's business, and that the profit realized from its disposition was therefore taxable as ordinary income. The taxpayer, which had been engaged in the building business since 1930, sometimes undertook "package" building projects—a term applied to a builder who, in addition to constructing a building according to a customer's specifications, procures a satisfactory site, arranges suitable financing, and then delivers the completed project to the customer (R. 130a). In this case, the taxpayer in 1951 undertook a "package" building project to construct a warehouse building for Prudential Insurance Company as purchaser, and to obtain Nash-Kelvinator Sales Corporation as lessee.

[2] See, *e.g.*, *Pool* v. *Commissioner*, 251 F. 2d 233 (C.A. 9), certiorari denied, 356 U.S. 938; *S.E.C. Corp.* v. *United States*, 241 F. 2d 416 (C.A. 2), certiorari denied, 354 U.S. 909; *Frankenstein* v. *Commissioner*, 272 F. 2d 135 (C.A. 7), certiorari denied, 362 U.S. 918; *Harry Slatkin Builders* v. *Commissioner*, 235 F. 2d 189 (C.A. 6), certiorari denied, 352 U.S. 928; *King* v. *Commissioner*, 189 F. 2d 122 (C.A. 5), certiorari denied, 342 U.S. 829.

The project was consummated in 1953 (the taxable year), at which time the building was conveyed to Prudential (R. 134a–140a). Each phase of the project, from its inception to completion, was reported to, and obtained the approval of, Prudential, the prospective purchaser (R. 137a).[3] On the basis of these evidentiary facts, the details of which are recited in its opinion, the Tax Court was fully justified in concluding that "[t]he work performed by [the taxpayer] in connection with the development and final disposition of the Sharon Hill project, to wit, site selection, assistance in design and lease negotiation, financing arrangements, and building construction was in keeping with his regular business operations," and that the resulting profit "was derived from property held by him primarily for sale to customers in the ordinary course of his trade or business" (R. 141a–142a).

The taxpayer's contention (Pet. 7) that the transaction which produced the profit in question was "in no way connected with petitioner's trade or business," but was a separate and unrelated investment transaction, is refuted by the record. It rests on the unwarranted assumption that component interdependent parts of the transaction—acquiring the land and negotiating the lease—are to be divorced from construction of the building and viewed as separate transactions. As both the Tax Court and the court of appeals emphasized (R. 142a–144a; Pet. 6a–12a), however, the transaction which produced the profit was a "pack-

[3] The evidence also shows that the taxpayer considered himself as only the "temporary owner" of the land and building which was to be conveyed to Prudential (Pet. 11a).

age" deal forming an integral part of the taxpayer's building business. Both courts below having decided this factual issue against the taxpayer, their concurrent finding is entitled to finality here. *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51; *Comstock* v. *Group of Investors*, 335 U.S. 211, 214.

3. The taxpayer mistakenly asserts (Pet. 4–7) that the court below "misapplied" this Court's holding in *Corn Products Co.* v. *Commissioner, supra.* It was there held that gains realized by a manufacturer of corn products from futures transactions were taxable as ordinary income, rather than as capital gains, because the transactions were "an integral part of its business." 350 U.S. at 50. In so holding, the Court stated that (*id.* at 52):

> Congress intended that profits and losses arising from the everyday operation of a business be considered as ordinary income or loss rather than capital gain or loss. The preferential treatment provided by § 117 applies to transactions in property which are not the normal source of business income. * * * Since this section is an exception from the normal tax requirements of the Internal Revenue Code, the definition of a capital asset must be narrowly applied and its exclusions interpreted broadly. This is necessary to effectuate the basic congressional purpose. This Court has always construed narrowly the term "capital assets" in § 117. * * *

Far from having disregarded these principles, as the taxpayer charges, the court below was "guided by" and expressly followed them (Pet. 7a–8a). The

court simply held, that, as in *Corn Products*, "the profit resulted 'from the everyday operation of a business' " (Pet. 12a).

The taxpayer relies (Pet. 8–9) upon cases holding that a dealer in property is not precluded from purchasing similar property for his own account, as an investor, and that profit from the sale of such property constitutes capital gain. But the same principles were applied in those cases as were applied by the courts below in this case. The difference in result reflects a difference in factual situations rather than any disagreement in principle since the courts in those cases found that the property sold had actually been held as an investment. In this case, as both courts below found, no showing was made that the transaction in question constituted an outside investment, *i.e.*, a transaction separate from the taxpayer's normal business activities. Instead, as the Tax Court observed, there is "nothing in the record which would justify a finding that [the taxpayer] ever intended this project solely as an 'investment' transaction and not as one where the eventual disposition was not in his usual course of business" (R. 143a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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